

# Safer and Stronger? The Decline of the SNP's Managerial Competence and Liberal Welfarism over Justice Policy in Government, 2007-2016

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Safer and stronger? The decline of the SNP's managerial competence and liberal welfarism over justice policy in government, 2007-2016.

Stuart MacLennan<sup>1</sup>

Since the SNP came to power in 2007, they have sought to pursue two objectives with respect to matters of justice: to demonstrate managerial competence; and to 're-tartanise' Scottish justice policy. While the headline figures present a generally positive figure of the SNP's nine years in government, belying these figures is an increasing tendency towards illiberal and authoritarian justice policies, as well as mismanagement on the part of ministers. This article therefore considers the SNP's approach to and management of justice policy, and whether or not they have been successful in the pursuit of their twin objectives. This paper considers the degradation of ministers' once-strong relationship with the legal professions, the management of the Crown Office and Procurator Fiscal Service, the establishment of Police Scotland, and the Scottish Ministers' increasing deference to the police on 'operational matters'. It further considers the continuation of the 'ned-bashing' agenda of the Scottish Government, and concludes that, while ministers might rhetorically seek to appear liberal and welfarist, in contrast to England and Wales, the reality has been the pursuit of punitive policies that are arguably even less liberal, and less welfarist, than that of their predecessors, or their counterparts in England and Wales.

**Keywords:** Justice, police, SNP, nationalism, Scotland.

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## 1. Introduction

As a nationalist party, whose primary object is a constitutional one, it is difficult to divine a particularly distinctive SNP approach to justice policy. In general, there is little in the way of ideological underpinning to SNP policy – with social-welfarism being combined with neo-liberal economic policy. The policies that we have therefore seen pursued by the SNP in government have been something of a mixed bag, driven primarily by two discernable motives: a desire to portray themselves as competent managers; and a desire to highlight Scotland's distinctiveness, in particular from the rest of the UK.

This purpose of this article is not to critique the individual acts or policies pursued by the SNP government in the field of justice. Such critiques have already been offered (see, e.g., Croall, *et al.*, 2012; Croall, *et al.*, 2015; McAra and McVie, 2010). Instead, the focus will be the Scottish Government's *approach* to justice policy under the SNP, though such a discussion inevitably involves some consideration of individual decisions. It should not be assumed, therefore, that the acts and policies discussed in this paper have been selected because of their relative importance or because they were particularly controversial. Those acts and policies that are considered in this paper have been selected because they are illustrative of the Scottish Government's overall approach to justice policy under the SNP.

This paper is structured in three sections. The first section provides an outline, explanation, and assessment of the key headline numbers in the field of justice policy. These numbers present a mixed, but mainly positive picture of the SNP's period in office.

Section two considers the first prevailing objective of the SNP's approach to justice policy in government: the desire to present themselves as managerially competent. This section analyses, in particular, the ministers' relationships with stakeholders in the legal professions, as well as management of the Crown Office and Procurator Fiscal Service (COPFS), which might otherwise escape public comment. It further considers some of the more damning criticisms of SNP ministers. It criticises the SNP's deference to the police on 'operational matters', and attempts to shut-down debate over policing policy. It also considers the the outcry over cuts

to legal aid, as well as the Scottish Government's U-turn over the abolition of corroboration in certain trials.

Section three considers the second key objective of the SNP in office: re-casting justice policy in Scotland as unique, and in particular, distinct from that of England and Wales. It concludes that, while the release of the Lockerbie bomber allowed ministers to paint a picture of a more liberal, welfarist approach to justice policy than their Labour predecessors, or England and Wales; their approach to offending amongst young people in areas of deprivation, in particular, appears to be every bit as punitive, if not more so, than in England and Wales.

## **2. Justice in Numbers**

In general, the evidence suggests that the SNP has presided over a period of increasing police strength and falling crime statistics, however there remain some concerning trends within the overall picture. A key manifesto commitment of the SNP in the 2007 election was the provision of 1,000 additional police officers. From the beginning of Q1 2006 to the end of Q2 2007, the average police strength in Scotland was 16,206 officers. From the period beginning Q1 2009 and ending Q2 2015 the average police strength has been 17,315 officers. This manifesto commitment has therefore been met and maintained (Scottish Government, 2014).

[FIGURE 1 HERE]

The data show a discernible drop in crime – both recorded and surveyed – in Scotland during the SNP's period in government (Scottish Government, 2015a). Overall reported crime fell from 419,257 incidents in 2006-07, to 256,350 in 2014-15 – a significant decline (it is worth noting that overall reported crime fell year-on-year throughout the SNP's time in government – see figure 1). This is borne-out by a slightly less significant drop in victimisation in the Scottish Crime and Justice Survey (Scottish Government, 2015a). There were also significant drops in recorded

instances of attempted murder and serious assault, robbery, drugs offences, weapons offences, most crimes of dishonesty<sup>2</sup>, and fire-raising and vandalism. However, marked increases in rape and other sexual offences can be observed (see figure 2), which might be explained, at least in part, by the broadening of the definition of rape by the Sexual Offences (Scotland) Act 2009.

[FIGURE 2 HERE]

With respect to civil justice, the period 2008-2014 shows encouraging trends (see figure 3), though the extent to which responsibility for this is attributable to government, and not broader economic conditions, is questionable. Most notable during this period is a sharp decline in the number of debt actions initiated and disposed of in the Scottish Courts. The Scottish Government's primary intervention in this respect is the Debt Arrangement Scheme (Scotland) Regulations 2011, which widened significantly the availability of debt arrangement schemes to debtors. However, since the economic downturn there is a wealth of evidence to suggest that both borrowers and lenders have been increasingly cautious (Bunn, 2014). Consumer credit is far less readily available, while consumers appear to be more willing to save, rather than borrow, in order to finance purchases.

[FIGURE 3 HERE]

During the same period, the Bank of England observed a significant decline in household debt-to-income ratios (Bunn, 2014). Between 1999 and 2008, the household debt-to-income ratio increased from 90 per cent to a peak of 160 per cent. Thereafter, while the stock of household debt stabilised, the ratio began to decline, reflecting modest increases in household income. This suggests a decline in consumers taking on new debts, and an increased emphasis upon servicing existing

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<sup>2</sup> With the exception of shoplifting, which has remained largely static.

debts. It follows, therefore, that this will lead to a decline in defaults and non-payment of debts, with a corresponding drop in the number of debt actions in the courts. A sharp decline can also be observed in the number of eviction and repossession actions, which, again, can partly be explained by a more risk-averse financial climate. There has been a modest increase in the number of personal injury claims, while the number of family cases remains fairly static. While these numbers generally paint a picture of modest success, this has not prevented the SNP's management of justice policy from becoming a target of criticism from opposition, academics, and press alike.

### **3. Managerial competence**

Having assumed office for the very first time in 2007, a key objective of the SNP Government in all areas of policy is demonstrating a fitness to govern. Serious managerial failures on the part of a party in power for the very first time might well do significant long-term damage to such a party. As such, the SNP's first term in office appears to have been a relatively cautious one. Perhaps emboldened by their majority victory in 2011, the SNP's second term in office has seen the pursuit of more controversial policies. However, the SNP's second term in office has also been one in which the managerial competence of certain ministers has been questioned. This is particularly true where justice is concerned.

A minister's background will inevitably inform their approach. It is known in the civil service in Scotland that 'wherever your minister comes from your policy will shift to there' (Mooney et al., 2014). Therefore, the biographies of the SNP justice ministers are more than mere penumbra in understanding the SNP's record in government. While it is unusual for health professionals to ever serve as health ministers, or educators to serve as education ministers, lawyers have dominated justice ministries under the SNP. While lawyers in justice ministries bring with them relationships with stakeholders that others often have to spend years building, 'experts', as Attlee once opined, often 'make the worst possible ministers in their own fields' (Hennessy, 2001: 147). It would be grossly unfair to apply such harsh judgement to the SNP's five justice ministers. Nonetheless, criticism of the SNP's

oversight of justice and legal affairs focuses heavily upon management, rather than policy.

### ***Relationships with professions***

Through the SNP's nine years in office, justice policy has been led by two Cabinet Secretaries, and three junior ministers; as well as two Lords Advocate and two Solicitors General. By far the dominant amongst these ministers was the long-standing Cabinet Secretary for Justice, Kenny MacAskill. A solicitor by profession and a widely known figure in the Scottish legal profession, MacAskill is a veteran of the SNP's left-wing 79 group, first elected for the Lothian region in 1999 and becoming the MSP for Edinburgh East and Musselburgh in 2007. MacAskill's closeness to Alex Neil – leadership rival to Alex Salmond in 2004 – was seen by some as contributing to his defeat when he ran in 2004 for the post of SNP deputy leader. Nevertheless, upon being elected leader Salmond appointed MacAskill to the shadow justice portfolio

Though throughout the SNP's period of office, a long-standing member of the SNP's left wing has dominated the justice portfolio, the supporting junior ministers have been known for their more conservative political views. Following the SNP's victory in 2007, Inverness MSP Fergus Ewing was appointed Minister for Community Safety. A fellow solicitor and son of SNP elder Winnie Ewing, Fergus Ewing is perhaps the most prominent remaining member of the once-dominant SNP right. Following the 2011 election, Ewing was appointed Enterprise Minister, a post in which he arguably appears more comfortable. Roseanna Cunningham replaced Ewing as junior minister. Erstwhile bearing the moniker 'Republican Rose', Cunningham is another former member of the 79 Group. However, in recent years, Cunningham has been better known for her more conservative views on social issues. Almost cementing the rule that the junior justice post has to be held by a conservative, Cunningham was succeeded as Minister for Community Safety and Legal Affairs in 2014 by Paul Wheelhouse, a former member of the Conservative Party. Following Nicola Sturgeon's succession to the office of First Minister, MacAskill was replaced as Cabinet Secretary by Michael Matheson, MSP for Falkirk West.

Lawyers have a palpable advantage in justice ministries – in particular in a small jurisdiction such as Scotland. The advantage is not one of knowledge or professional competence, but an advantage with respect to the relationships with stakeholders that are so crucial to the success of ministers in any field. Lawyers like to deal with one of their own, and consequently the legal profession broadly welcomed MacAskill's appointment in 2007.<sup>3</sup>

The good will enjoyed by MacAskill and Ewing in the SNP's first term allowed the Government to pursue structural reforms of the legal profession. Evidence that MacAskill and Ewing were sympathetic to the interests of the legal professions can be seen in their response to an Office of Fair Trading report on legal services in Scotland (Scottish Government, 2007). MacAskill rejected the adoption of a legal services board for Scotland (something similar had recently been established in England and Wales) on the grounds that such a measure would be 'a disproportionate and inefficient response' (Scottish Government, 2007). In turn, and in stark contrast to the legal professions' obstinate opposition to previous liberalisations of the legal services market (Stephen, 2013), the Law Society of Scotland welcomed the Scottish Government's consultation *Wider Choice and Better Protection*, including proposals to permit the introduction of alternative business structures.

The Legal Services (Scotland) Act 2010 has as its primary aim the removal of current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors organise their businesses. The Act seeks to further loosen the monopoly enjoyed by the Faculty of Advocates and the Law Society. It allows solicitors to form partnerships with non-solicitors, and to seek investment from outside the profession (the so called 'Tesco Law'). Throughout the Bill's progress there was an evident desire amongst politicians of all hues to curry favour with the legal professions. For example, early versions of the Bill permitting 100 per cent ownership by non-

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<sup>3</sup> A similar observation could be made of Jim Wallace, who was the only lawyer to hold a justice portfolio in the previous Labour/Liberal Democrat coalition government.



solicitors of legal service providers was amended by the opposition parties at Holyrood (at that point constituting a majority) to require 51 per cent ownership by solicitor investors or members of regulated professions. Nonetheless, despite attempts by opposition parties at currying favour with the professions, such comprehensive reforms would not have been so easily achieved but for the strong relationships that existed between ministers and the professions. This generally positive relationship with the profession appears to have lasted into the SNP's second term, with the Law Society welcoming MacAskill's re-appointment in 2011. However, within a year that relationship was to deteriorate significantly. By 2012, Edinburgh Bar Association President Cameron Tait described MacAskill's relationship with the legal profession as 'irreparable' (BBC, 2012).

Amongst the measures MacAskill sought to pursue with which the professions took umbrage was significant reforms to the provision of legal aid, with the expressed objective of cutting costs (Rose, 2014). Lawyers engaged in active revolt over the Scottish Civil Justice Council and Criminal Legal Assistance Bill – which reduced significantly the income level at which legal costs would have to be paid for by parties. Following a series of one-day walk outs by criminal defence lawyers at a number of Sheriff Courts, MacAskill intervened to increase the qualifying threshold from a disposable income of £68 per-week to £82 (BBC, 2013).

Ministers drew further criticism from the legal professions for pursuing the abolition of the corroboration requirement in rape trials, *inter alia*. Following the Supreme Court's ruling in *Cadder v. HMA*, the Scottish Government commissioned a wide-ranging review of criminal procedure in Scotland, to be led by Lord Carloway. Amongst his recommendations was the abolition of the requirement that evidence be corroborated in trials for certain sexual offences. The proposal was expectedly welcomed by police and victims' groups, however more sceptically received by academics and judges. (Nicolson and Blackie, 2013)

The arguments in favour of abolition were three-fold. The first, was that the requirement is inconsistent and ineffective, is not fit for purpose. The second, is that it is disproportionately prejudicial to the interests of victims and the public. The third, is that judges and juries can be trusted to evaluate accurately the strength and

reliability of evidence free from legal regulation and because there exist a range of other protections against unjust convictions.

The Scottish Government welcomed the proposal, taking the view that '[t]he rationale for the rule stems from another age, its usage has become confused and it can bar prosecutions that would in another legal system seem entirely appropriate' (Scottish Government, 2012, 41). However, in the face of sustained opposition from practitioners (Faculty of Advocates, 2015), in particular, the proposal was dropped by new Justice Secretary Michael Matheson soon after his appointment.

### ***Management of crown office and procurator fiscal service***

Upon taking office in 2007, Alex Salmond sought to "de-politicise" the office of Lord Advocate, by retaining Elish Angiolini, first appointed by Jack McConnell, in her post – inviting her only to attend cabinet where necessary. Salmond ostensibly sought to transform the office of Lord Advocate from a ministerial post to an administrative one. Nonetheless, the Lord Advocate remained the Scottish Government's chief legal advisor and remained in charge of the Crown Office and Procurator Fiscal Service (COPFS).

The management of the COPFS has been the subject of considerable criticism in recent years. In 2008, Crown Office mismanagement led to the collapse of the trial of Angus Sinclair, accused of the 'World's End' murders in 1977 (MacQueen and Wortley, 2008). In response to outcry over the trial's collapse the Scottish Government ordered a review into Scotland's double jeopardy rule, which paved the way for the eventual scrapping of the rule for certain serious crimes in the Double Jeopardy (Scotland) Act 2011. The Act – which, somewhat controversially, had retrospective effect – led to the re-trial and eventual conviction of Angus Sinclair. While the legislation attracted cross-party support in Holyrood, it is arguable that a significant protection for accused persons – that the Crown cannot simply keep trying someone until they get the result they want – should not have been scrapped simply because of the errors of the COPFS.

COPFS has attracted further criticism in recent years. Two examples will have to suffice. The first pertains to the trial of former Downing Street Director of

Communications and *News of the World* Editor Andy Coulson. Coulson was acquitted as a result of Lord Burns' ruling that the evidence presented by the Crown Office was 'not legally relevant' owing to the fact that 'not every lie amounts to perjury' in Scots law. James Chalmers has questioned why the case was brought to trial in the first place (Leask, 2015). The second was a 2015 decision by COPFS not to prosecute the driver of a bin lorry that crashed in Glasgow, killing six people. The decision, taken in advance of a fatal accident inquiry into the crash, which revealed that the driver had not disclosed past instances of blackouts to his employers or the DVLA, sparked outrage amongst some victims' families who decided to pursue a rare private prosecution in response to the decision (BBC, 2015a).

It is arguable that these controversies, and others, might have been avoided but for the increasingly ambiguous role of the Lord Advocate. Alex Salmond's decision to downgrade the role, *de jure*, from an ostensibly ministerial one to an advisory one has not been matched by any organisational changes. The Lord Advocate is both Scotland's chief prosecutor and also the responsible member of the Scottish Government. The division that has existed in England and Wales since the Prosecution of Offences Act 1879 between the Attorney General and the Director of Public Prosecutions – where the former provides ministerial oversight of the latter – does not exist in Scotland. It is arguable the COPFS in Scotland effectively acts without ministerial oversight – which is exacerbated further by the effective removal of the Lord Advocate as a minister in the Scottish Government.

### ***Establishment of Police Scotland***

Until the mid 20<sup>th</sup> century, Scotland had scores of police forces, with every County and Large Borough Council providing its own force. This local provision of policing was carried forward following the Wheatley Review of Local Government and its implementation in the Local Government (Scotland) Act 1973 - with regional councils assuming the responsibility for the provision of a police force. The Local Government, etc. (Scotland) Act 1994 significantly weakened the link between local government and policing. That act reorganised local government into 32 unitary

authorities, with responsibility for policing being retained at a regional level through regional police authorities.

However, the link between local government and policing was broken entirely by the Scottish Government's merger of Scotland's eight police forces into a single force – Police Scotland. The SNP has been refreshingly honest about the reasons for the merger. While it might have been tempting to argue that such a merger was motivated by a desire to improve coordination and organise on operational rather than regional bases, the Scottish Government has never sought to pretend the exercise was motivated by anything other than budgetary savings (Scottish Government, 2011). However, at least two consequences of the merger have attracted significant criticism.

The first criticism is that the merger of Scotland's eight forces into one has resulted in a 'one size fits all' model of policing, without the regional variations afforded by the eight previously existing forces. The policing policies and practices of urban and central Scotland quickly made their way into employment in Scotland's more remote and rural communities. The deployment of armed police on patrol in small highland towns such as Beaulieu and Brora has sparked alarm amongst residents and politicians from the Highlands and Islands (Ross, 2014). Independent, formerly SNP, MSP John Finnie has led the opposition to this policy, forcing MacAskill to respond to criticism in the Scottish Parliament. MacAskill defended the policy, stating that he believes 'that the public understands and accepts the need for a small number [...] of police officers to be authorised to carry firearms and for the chief constable to have operational independence over their deployment and use' (Scottish Parliament Official Report, 2014). This deference to the 'operational independence' of the police is increasingly commonplace amongst SNP ministers, and is discussed further below.

The second criticism is that what little political oversight of Scottish Policing that remained following previous reorganisations was all but removed, with the new Scottish Police Authority (SPA) being charged with scrutinising Police Scotland. While Police Scotland has not lacked critics, such criticism has been notably unforthcoming from the SPA. Instead, in the face of vociferous criticism of Police Scotland, the SPA

appeared to be its staunchest defender with SPA chair Vic Emery issuing joint statements with Chief Constable Sir Stephen House in defence of the force (Police Scotland, 2015).

Public criticism of the force became loudest following the deaths of John Yuill and Lamara Bell. Yuill and Bell died following a car crash on the M9 to which Police Scotland did not attend until 72 hours after it was first reported to the police (BBC, 2015b). Bell was still alive and reportedly trying to escape when the police arrived at the scene, before subsequently dying in hospital. Outcry over this failing was quickly followed by the resignation of Police Scotland's Chief Constable, Sir Stephen House. Reported dissatisfaction amongst other members of the SPA (Hutcheon, 2015a) was soon followed by the announcement that Emery would not seek re-appointment as chair of the SPA.

### ***Deflective and Illiberal***

In the face of mounting criticism over justice policy, in particular with respect to policing, the Scottish Ministers' increasingly standard response has been to seek to deflect criticism by insisting that such questions concern 'operational matters' upon which they therefore cannot comment. However, the Scottish Ministers' understanding of what constitutes an 'operational matter' appears to be unlimited in scope, which is a cause of some considerable concern.

There are two possible explanations for this stock response, which are not mutually exclusive. First, is that Scottish Ministers have become so 'house-trained' that they find themselves entirely subordinate to the Police. This first explanation has been christened 'Ploditis' by Kevin McKenna (2015), which he describes as 'a condition that attacks the central nervous system and reduces the victim to a jelly-like state in the presence of top brass from *le vieux Guillaume*'. Were this first explanation to be accurate then this represents a truly worrying state of affairs: through their obsequiousness, the SNP would have effectively handed over control of policing policy to the police. A second, and no less worrisome explanation is that the SNP wish to depoliticise policing (i.e. removing it from the sphere of political debate). If this is the case, then in effect the consequence appears to be that either

the police, or the Scottish Ministers, are given *carte blanche* over policing policy. While the SNP, obviously, cannot be blamed for the ineffectiveness of their opponents in critiquing their policies in government, attempting to shut-down all discussion about policing policy reflects an illiberal streak that is becoming increasingly commonplace in the Scottish Government's approach to justice policy.

This can further be seen in the Scottish Government's approach to the release of stop and search data, in particular with respect to research undertaken by Kath Murray (2014), discussed further below. The Scottish Government and Police Scotland appeared to have gone to great lengths to hinder Dr Murray's research, including attempting to release data on the condition that anything published in relation to the data be subject to pre-approval by Police Scotland. Furthermore, it was reported that the Scottish Government sought to block the publication of data that would lead to unflattering comparisons with England and Wales (Hutcheon, 2015b).

There can be little doubt that the management of justice and policing has become a weakness of the SNP in Government. As a result it has become the focus of both opposition parties and the press. However, the Scottish Government's response to such criticism has been extremely concerning, with ministers seeking to shut down all public discussion about policing policy, in particular, by deference to the 'operational independence' of the police.

#### **4. Re-tartanisation**

In the summer of 2009, Justice Secretary Kenny MacAskill took the decision to release Abdelbaset Ali Mohamed al-Megrahi – the only person ever convicted of the bombing of flight PanAm 103 over Lockerbie (more commonly referred to as the Lockerbie Bomber) on compassionate grounds. The decision to release Megrahi on compassionate grounds is discussed in detail below, with the decision being justified by the fact that '[i]n Scotland, we are a people who pride ourselves on our humanity. It is viewed as a defining characteristic of Scotland and the Scottish people (Scottish Parliament Official Report, 2009). It has long been claimed that the Scottish justice

system is underpinned by distinctive principles. McAra charts the de-tartanisation of criminal justice policy since the inception of devolution (2006). However, while it appears that one aim of the SNP in government has been to re-tartanise justice policy, the extent to which they have succeeded in doing so remains highly questionable.

There is little doubt that the approach to criminal justice policy in Scotland was once markedly different. Mooney, et al. (2015) offer one plausible explanation for the divergence between justice policy and Scotland and the rest of the UK: that pre-devolution justice policy was administered almost entirely by civil servants, with decisions being 'virtually rubber stamped' by ministers, buttressed by a succession of Secretaries of State who were more liberal than many of their southern colleagues. McAra and Young (1997) argue that this divergence can be attributed to Scotland's smaller size fostering a stronger 'civic culture'.

While the tide of punitivism was held back by Liberal Democrat Justice Minister Jim Wallace for a period, the criminal justice agenda of the Labour-led Scottish Executive was heavily focused upon dealing with the problem of youth offending by 'neds'<sup>4</sup> through anti-social behaviour orders (ASBOs) and downgrading of community sentencing. Though it is arguable that this distinction between Scotland and the rest of the UK was more apparent than real, any attempt at maintaining this pretence was, arguably, largely abandoned in the early days of devolution.

The de-tartanisation of criminal justice policy during the immediate post-devolution period can, in part, be explained by the removal of the administration of justice from supposed 'elites' - from the Westminster Government and the civil service in Edinburgh - to Scottish Ministers who come-from and represent some of the most deprived areas in Scotland. Furthermore, there existed a discernable desire for policies in Scotland not to deviate too far from those of the New Labour Government in Westminster, for fear that the SNP (then in opposition) might these exploit such divergences. Expectedly, the SNP's accession to office in 2007

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<sup>4</sup> Commonly understood to stand for 'non-educated delinquents'.

eliminated any will for Scottish justice policy to converge with that of Westminster; with the opposite desire, at least perceptively, being the case.

### ***Release of the Lockerbie bomber***

The release of Megrahi had long been an objective of Qaddafi's Government in Libya. This became abundantly clear in the course of Libya's rapprochement with the United Kingdom in the period beginning the early 2000s. Megrahi's detention in a Scottish prison inevitably put the Scottish Ministers at the centre of any decision as to his fate. The decision saw numerous competing factors at play. The U.S. was determined that Megrahi should not be released under any circumstances, and argued that the 1998 agreement between the UK and U.S. precluded such a release. Conversely, the UK was keen to further improve its relationship with Libya, with commercial considerations being the primary motive (Kenealy, 2012). Knowing of the UK's commercial interests, Libya tied the conclusion of a prisoner transfer agreement (PTA) to the furtherance of broader cooperation with the UK. Scotland's position, however, shifted – largely as a consequence of the unfolding of events.

Initially, Scotland's position with respect to UK-Libya relations was that they were not being adequately consulted in the PTA process, particularly given that the only Libyan serving a sentence in a UK prison at the time was Megrahi. This, it is arguable, was primarily motivated by a desire to be seen to be standing up for Scotland's interests against an indifferent UK government. Fearing being placed in a difficult position and being subject to significant external pressure from multiple parties with competing interests, the Scottish Government was insistent that any PTA should contain a specific exception for Megrahi. While the UK was initially sensitive to the concerns of the Scottish Government, the PTA was ultimately concluded without any exception for Megrahi.

The dynamics of the situation shifted considerably in October 2008, following Megrahi's diagnosis with terminal prostate cancer. This diagnosis presented SNP ministers with a third option, one that would allow the Scottish Government to put a uniquely Scottish gloss on the situation. Megrahi's terminal diagnosis presented the possibility of release from prison on compassionate grounds under the Prisoners and



Criminal Proceedings (Scotland) Act 1993. Compassionate release presented two attractions for SNP ministers. First, it allowed the Scottish Government 'to articulate a distinctive Scottish identity with specific values of compassion and justice' (Kenealy, 2012: 569). Second, it facilitated the othering of the UK government, by contrasting Scotland's compassionate approach with the UK's shady dealings motivated by commercial interests. It is highly likely, according to Kenealy (2012: 560), that had Labour been in power in Scotland that Megrahi would have been released anyway, but under the PTA, and not on compassionate grounds.

Internationally, the decision met with a mixed response. While the Libyan Government praised Scotland for its compassion, the U.S. was in uproar. President Barack Obama and Secretary of State Hillary Clinton publicly berated the Scottish Government ministers. This elevated Alex Salmond and Kenny MacAskill to international renown, even if only for being the subject of US derision. Cognisant of their own role in seeking Megrahi's release, the UK Government was expectedly mute on the subject, stating that it was a decision for the Scottish Government, alone, to take (Sparrow, *et al.*, 2009).

Domestically, too, the decision met with a mixed reaction. On the one hand, there remained considerable doubt about the soundness of Megrahi's conviction in the first place (Black, 2004). On the other, the Scottish Labour Party sought to use the issue as a wedge, and came out vociferously against the release of Megrahi. This position, however, was compromised considerably by the then-Labour UK Government's efforts to secure Megrahi's release. However, the primary difficulty for SNP ministers came not at the point of Megrahi's release; but long after Megrahi was expected to have died, but didn't. While compassionate release can normally only be granted where a prisoner is expected to live for not more than three months, Megrahi remained alive in Libya for three years. This raised questions about the quality of the medical evidence sought by MacAskill in order to justify release on compassionate grounds. Labour MSP Dr Richard Simpson, a former associate member of the Society of British Urological Surgeons, described the release under the three-month rule as 'highly questionable' (Scottish Parliament Official Report, 2009).

Notwithstanding the ongoing criticism of the decision to release Megrahi, the ultimate objectives of the SNP were met. The Scottish Government was able to paint a picture of uniquely Scottish values which underpinned the decision, whilst simultaneously placing Alex Salmond and Kenny MacAskill squarely, albeit fleetingly, at the centre of the world stage. Yet despite this broadly successful effort at painting Scottish justice policy as unique, and distinct from that of England and Wales, in particular – the distinctiveness of Scotland and/or the SNP's approach to justice policy is far less considerable than the SNP's rhetoric over Megrahi suggests.

### ***“Neds”***

Throughout the SNP's first term, in particular, the opposition Labour Party continued to attempt to paint the SNP as soft on crime, relentlessly advocating a somewhat sensationalist 'carry a knife, go to jail' policy. However, notwithstanding the rhetoric of the Labour party, the reality is that the SNP had abandoned its earlier pretence to liberalism and welfarism in justice policy. By 2008, cracks began to appear in the SNP's liberal, welfarist veneer. Concerned about the scourge of drunken teenagers blighting Scottish towns, the Scottish Government launched a pilot programme designed to test the viability of raising the age at which younger people could purchase alcohol in off-licenses. The pilot was met with sustained resistance, led the Coalition Against Raising the Drinking Age in Scotland (CARDAS). The pilot was condemned by campaigners for demonising younger people, reflecting the new government's return to the 'neds' agenda of their Labour predecessors. In light of this opposition, the pilot programme was ultimately abandoned.

However, the 'neds' agenda appears not to have vanished from the Scottish Government's minds. The SNP's second term in government has revealed one of the more deplorable aspects of Scottish policing policy; the massive proliferation of 'stop and search', in particular with respect to children and young people. There exists considerable evidence that the use of stop and search is focused on the problem of 'neds', with such searches being employed in abundance in areas of relative deprivation and, in particular, on younger people. In 2010, Strathclyde Police conducted approximately 37,000 searches of 16 year olds. With approximately

26,000 resident 16 year olds, this amounts to 1.4 searches for every 16-year-old resident in the Strathclyde region. Notably, in 2010, approximately 500 searches were conducted of children under the age of 10 (Murray, 2014: 25).

Data shows sharp rises in the use of stop and search in Scotland, in particular in the former Strathclyde and Central force areas (Murray, 2014: 15). Further evidence from Police Scotland suggests that this upward trend continued after the creation of the force. However, despite the sharp focus, within the stop and search strategy, upon young people, the basis for such a focus is extremely questionable. Despite an overwhelming focus upon young people, Murray identifies a 'huge discrepancy' between the number of searches of young people carried out and the relatively consistent detection rates across all age groups. Thus, according to Murray (2014: 26),

the sharp discrepancy between the age distribution of searches and persons charged, together with low detection rates, suggests that young people may be over-policed in some parts of Scotland, that is, subject to excessive levels of stop and search, over and above the probability of offending.

The most notable distinction between Scotland on the one hand, and England and Wales on the other, is the use of non-statutory searches. Police Scotland's guidance as to when a consensual search may be carried out provides that,

[w]here an officer wishes to conduct a consensual search on a person who is not acting suspiciously, nor is there any intelligence to suggest that the person is in possession of anything illegal, then this search is consensual and the officer must ask the subject if they can search them. (Murray, 2014, quoting Police Scotland)

Such searches of persons where the police have no lawful grounds to suspect that a person is acting illegally in any way have been outlawed in England and Wales

owing, *inter alia*, to difficulties in obtaining informed consent. The typical defence of such strategies is that they have a deterrent effect. It has been argued that the low detection rates from such searches are in fact evidence of the success of the policy (BBC, 2010). This logic is clearly specious. There is no evidence of a direct link between the likelihood of being searched and the likelihood of offending. Most criminological studies of such a link are inconclusive, but highly sceptical (Bland, et al., 2000; Manning, 2010).

The focus of stop and search on young people and areas of relative deprivation reflects a continuation of the 'ned-bashing', 'ASBO-wielding' approach of SNP ministers' Labour predecessors. While rhetorically, MacAskill invoked 'compassion' and 'humanity', the reality is that the approach of the SNP in government has been remarkably similar to that taken by their predecessors; and in some respects is arguably less liberal, and less welfarist, than in England and Wales.

## **5. Conclusion**

For the period 2007-11, the SNP in government broadly succeeded in satisfying the twin objectives of managerial competence while portraying Scottish justice policy as distinctive from that of England and Wales. In their first term in office, SNP ministers successfully steered significant reforms of the legal professions through parliament, maintaining good relations with the professions throughout. Though some managerial failings were evident – in particular, in the COPFS – SNP ministers largely avoided any blame. Meanwhile, the most controversial decision of the SNP's first term presented ministers with an opportunity to present Scottish justice policy as unique, with the added advantage of elevating Scottish ministers to notoriety on the world stage.

However, the second term saw ministers encounter considerable difficulties in the management of justice policy. The reorganisation of Scotland's police forces, as well as cuts to legal aid, and a U-turn over the abolition of the requirement for corroborated evidence in sexual offences trials significantly tarnished MacAskill's reputation as a competent manager. MacAskill's eventual exclusion from the

Scottish Government is doubtless in part attributable to these failings. Furthermore, the SNP's second term has eroded the perception that Scottish justice policy is more liberal and welfarist than England and Wales.

Of greatest concern is the Scottish Government's purported deference to Police Scotland's 'operational independence'. The only conclusions that can be drawn from this increasingly standard response is either that SNP ministers do not believe that such matters ought to be the subject of political discourse, or that SNP ministers are not overseeing policing policies at all. Both of these conclusions are extremely concerning – and portray an authoritarian and illiberal streak in SNP ministers.

The SNP will doubtless enter the 2016 Scottish Parliamentary election campaign rightly boasting of their maintenance of increased police strength, as well as year-on-year drops in overall crime. However, the overall picture of the SNP's management of justice policy in government, in particular since 2011, is of mismanagement and illiberalism – and therefore represents one of the greatest weaknesses of their nine years in power.

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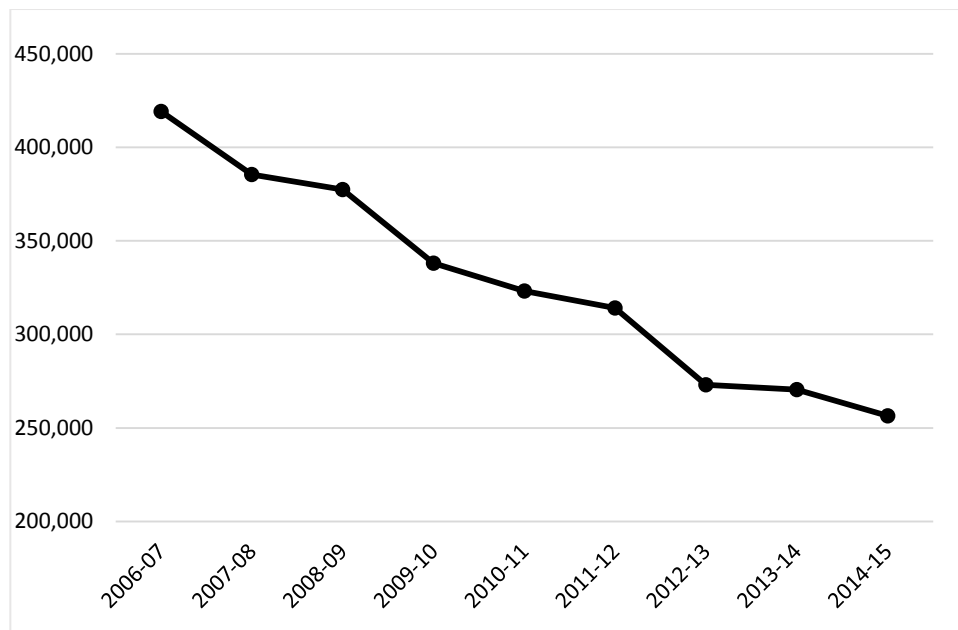
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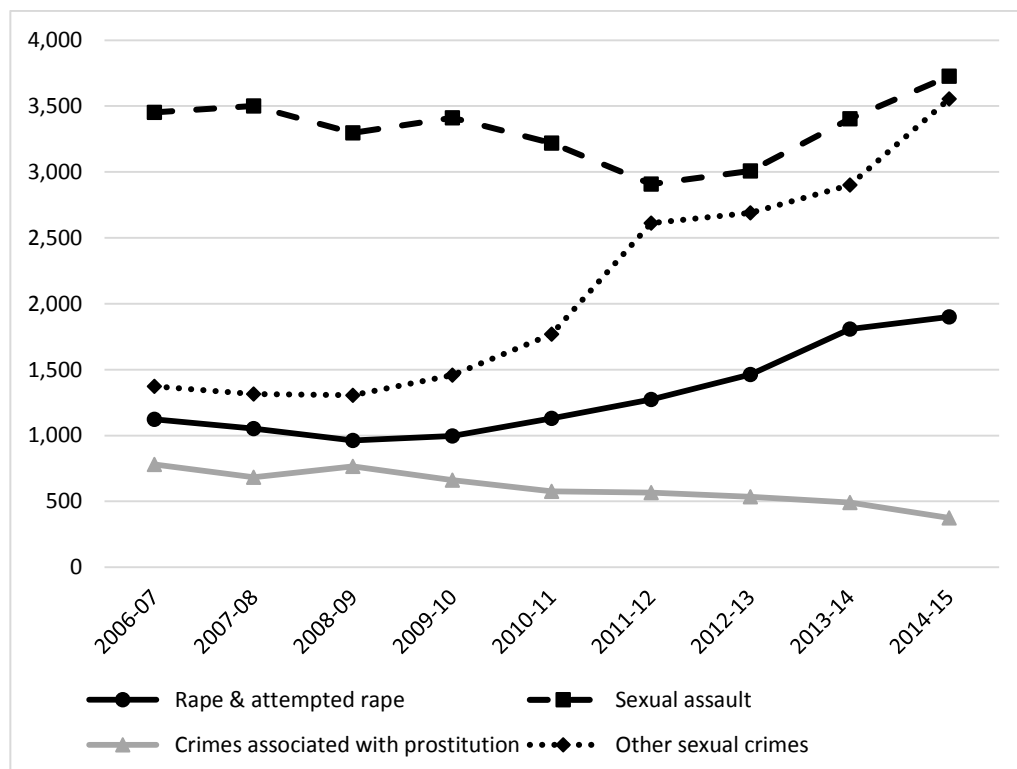


**Figure 1.** Total recorded crimes in Scotland, 2006-15.



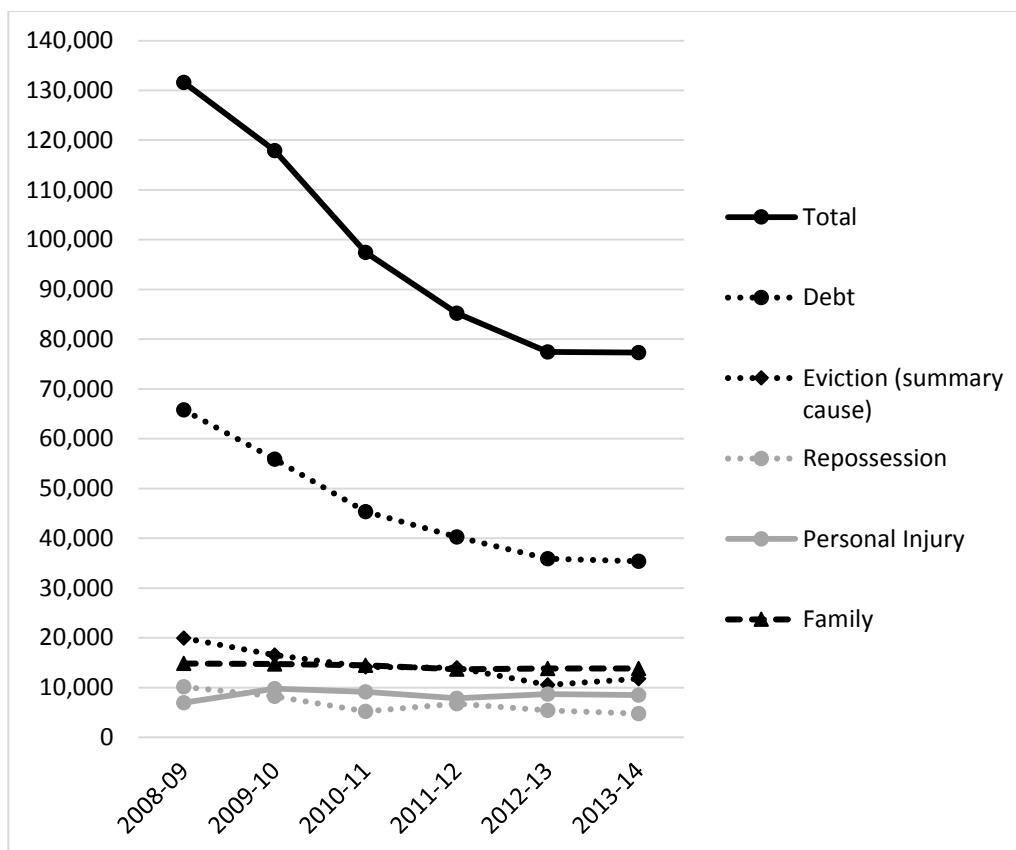
Source: Scottish Government, 2015a

**Figure 2:** Recorded sexual offences in Scotland, 2006-15.



Source: Scottish Government, 2015a

**Figure 3:** Civil actions initiated in Scotland, 2008-14.



Source: Scottish Government, 2015b